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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 715/2015*, **

Communication submitted by:	S.S. (represented by counsel, Raj S. Bhambi)
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	20 November 2015 (initial submission)
Date of present decision:	28 November 2017
Subject matter:	Deportation to India
Procedural issues:	Admissibility — exhaustion of domestic remedies; manifestly unfounded
Substantive issues:	Non-refoulement; refugee status; torture
Articles of the Convention:	3 and 22 (2) and (5) (b)

1.1 The complainant is S.S., a national of India born on 10 December 1962, who at the time of submission of the present communication was subject to removal to India. He claims that his removal to India would constitute a violation by Canada of article 3 of the Convention.

1.2 On 23 November 2015, pursuant to rule 114, paragraph 1, of its rules of procedure, the Committee requested the State party not to deport the complainant to India while the communication was being considered by the Committee. On 25 July 2016, the Committee granted the State party's request to lift the interim measures.

The facts as presented by the complainant

2.1 The complainant is Sikh from the State of Punjab, India. In 1989, the complainant and his father became members of Shiromani Akali Dal (Amritsar/Mann), a Sikh political party advocating for an independent homeland for Sikhs (Khalistan). The complainant became a prominent member of the party in his village. On 5 January 1992, he was arrested at a rally by the Indian police and released after six days, following the payment to the police of a bribe of 30,000 Indian rupees (Rs) by his father. The complainant was tortured while in detention and warned that he would be killed if he continued his political activities.[1] The complainant was again arrested by the police at a meeting on 29 November

* Adopted by the Committee at its sixty-second session (6 November–6 December 2017).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Claude Heller Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Racu, Sebastien Touzé and Kening Zhang.

[1] The complainant claims to have been tortured with a hot rod, which was applied to his stomach and head, causing an infection and leading to surgery; beaten on the soles of his feet and buttocks with

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1993. He spent four days in detention, during which time he was tortured. The complainant was released after his father paid a bribe of Rs 50,000 and subsequently spent three days in hospital. In December 1993, the police raided his home. However, the complainant was not there and, after seeing the police, escaped and stayed in another village. On 5 February 1994, he attempted to visit his parents but had to run away because the police came to his parents' home searching for him. The complainant then fled to the United States of America with the help of an agent and applied for asylum there. His asylum application was rejected in 2004. In order to avoid deportation from the United States, he fled to Canada with the help of an agent on 12 February 2010.

2.2 The complainant applied for asylum in Canada on 3 March 2010. His request was rejected on 7 May 2013. On 2 July 2013, he applied to the Canadian Federal Court for leave to seek judicial review of the decision. The Federal Court dismissed the complainant's application on 9 October 2013. The affidavits from his fellow villagers and his father, which the complainant presented to substantiate his claims, were found not to have probative value. The complainant's applications for a pre-removal risk assessment and residence on humanitarian and compassionate grounds and his request for deferral of removal were denied in 2015. He was asked to leave the country on 8 October 2015.

2.3 The complainant informed his father that he would arrive to India on 25 November 2015. According to the complainant, his father shared this information with a few members of the local government in order to make sure the complainant was safe from the police. Informed of the complainant's return, the police raided his home and arrested his father on 12 October 2015. His father was released on 17 October 2015 and since then he has been detained at home and prohibited from taking part in any political activities.

The complaint

3.1 The complainant asserts that the State party would violate his rights under article 3 of the Convention by forcibly removing him to India, where he would be at risk of torture, cruel treatment and even the death sentence due to his alleged connections with Sikh terrorism in the State of Punjab. The complainant was twice arrested and subjected to brutal torture by officials of the Indian police, which continues to actively search for him and harass and torture his family members. He claims that the Canadian authorities erred in their assessment of the risk he would face if returned to India. The complainant maintains that, according to credible reports, India is affected by serious human rights problems, including police abuse, extrajudicial killings and torture.[2] On 15 October 2015, the police arrested the leader of the Shiromani Akali Dal (Amritsar/Mann) party and thousands of the party's members during a demonstration organized by Sikhs in protest against the desecration of their holy book in the village of Bargari. The Indian police may suspect Sikhs living abroad of instigating the protests.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 6 March 2016, the State party requests the Committee to lift the interim measures. It submits that the complainant has not established that he would be at risk of irreparable harm if removed to India and that his claims have been thoroughly assessed by the domestic authorities. Even if his allegations were accepted as true, based on objective country reports, he could avail himself of an internal flight alternative, since his political profile is not likely to make him of interest to the central authorities in India.

4.2 The State party indicates that the complainant's application for asylum was denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada. The Board concluded that his allegations were not credible. It did not find it reasonable to believe that the Indian police considered him to be a person of interest; that they were seeking him; that they would be interested in the complainant, but not in his father, who was as well politically active in the Shiromani Akali Dal (Amritsar/Mann) party; that the

leather belts and rods; forced to lie on a large block of ice; hung upside down by a rope attached to the ceiling, etc.

[2] See the United States, Department of State, "Country Reports on Human Rights Practices for 2012: India" and "International Religious Freedom Report for 2012: India".

police released the complainant from custody only to search for him a few days later; or that the police would have continued to harass the complainant's father and wife for 19 years in relation to the complainant, knowing that he was abroad. The complainant's applications for leave to seek judicial review, a pre-removal risk assessment and permanent residence on humanitarian and compassionate grounds were also rejected after the immigration officers concerned reached the conclusion that he would not face the risk of disproportionate hardship upon return to India.

4.3 The State party refers to objective documentary reports, according to which the human rights situation for Sikhs in India has improved to the extent that it can no longer be said that there is a general risk of ill-treatment upon return solely on the basis of one's real or perceived political opinion.[3] While the majority of Sikhs live in the State of Punjab, there are also sizable Sikh minorities in other Indian States and there are Sikh communities all over India.[4] Sikh communities are thriving across the country and many persons of the Sikh faith hold prominent official positions.[5] Moreover, country reports do not suggest that there exists a general risk in India of ill-treatment for members of the Shiromani Akali Dal (Amritsar/Mann) party. The party operates openly.[6] Knowledgeable sources have been quoted as stating that members were not subject to ill-treatment unless the individual was suspected by police of terrorism, extremism or violent activities, and that outspoken members were not harassed or arrested for participating in party gatherings, publicly complaining about the treatment of Sikhs by authorities or calling for the creation of Khalistan.[7] In contrast, other knowledgeable sources have indicated that party members were harassed or arrested at certain times for participating in party gatherings, publicly complaining about the treatment of Sikhs or calling for the creation of Khalistan, and that party members had been taken into preventive detention in advance of planned

[3] See the United Kingdom of Great Britain and Northern Ireland, Border Agency, "Operational Guidance Note: India" (May 2013), para. 3.9.13, available at: http://www.refworld.org/docid/51a8906f4.html; the United States, United States Bureau of Citizenship and Immigration Services, "India: Information on relocation for Sikhs from Punjab to other parts of India" (16 May 2003), available at: www.refworld.org/docid/3f520d4b4.html; the United Kingdom, Home Office, Immigration and Nationality Directorate, "Operational Guidance Note: India" (20 February 2007), para. 3.6.17, available at: www.refworld.org/docid/46028cc82.html.

[4] See Canada, Immigration and Refugee Board of Canada, Research Directorate, "Situation of Sikhs outside the state of Punjab, including treatment by authorities; ability of Sikhs to relocate within India, including challenges they may encounter (2009-April 2013)" (13 May 2013), available at: www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=454556; the United Kingdom, Border Agency, "Operational Guidance Note: India" (May 2013), para. 3.9.15; the United Kingdom, Home Office, "Country Information and Guidance – India: Religious minority groups" (April 2015), para. 6.1.14.

[5] See the United Kingdom, Border Agency, "Operational Guidance Note: India" (May 2013), para. 3.9.12; the United Kingdom, Home Office, "Country Information and Guidance – India: Religious minority groups" (April 2015), para. 6.1.16.

[6] See Canada, Immigration and Refugee Board of Canada, "India: Treatment of Sikhs in Punjab (2013-April 2015)", part 2.3.1.

[7] See Canada, Immigration and Refugee Board of Canada, Research Directorate, "India: Whether members of the Akali Dal (Mann) / Akali Dal (Amritsar) party are harassed and arrested for participating in party gatherings, for publicly complaining about the treatment of Sikhs by Indian authorities or for calling for the creation of Khalistan (separate homeland for Sikhs); whether police regard members of the Akali Dal (Mann) party with suspicion and monitor them for signs of any links with terrorism (2005-March 2009)" (14 April 2009), available at: www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=452305. See also United States Citizenship and Immigration Services, "India: Information on Treatment of Members of the Akali Dal (Mann) Party in Punjab (16 May 2003), available at: www.uscis.gov/tools/asylum-resources/ric-query-india-16-may-2003, which states that there was little recent evidence suggesting that members or supporters of the Akali Dal (Mann) party in Punjab were being systematically targeted for arrest or other forms of mistreatment by police. See also Canada, Immigration and Refugee Board of Canada, Research Directorate, "India: Treatment of political activists and members of opposition parties in Punjab (2012-April 2015)" (11 May 2015), part 2, available at: http://irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=455886&pls=1, which reports sources as stating that political opposition parties in Punjab were able to express their ideas freely.

demonstrations.[8] However, even where sources state that Shiromani Akali Dal (Amritsar/Mann) members or leaders were subject to such treatment, they do not indicate that it would occur outside of the State of Punjab.[9] In addition, and more generally, although some knowledgeable sources indicate that Sikhs who advocated for and support a separate Sikh state, or Khalistan, continued to face ill-treatment in the State of Punjab,[10] it has been reported that there existed no general risk of ill-treatment for Sikhs who were returned to India solely on the basis of ideological support for the establishment of Khalistan.[11]

4.4 The complainant has not provided any evidence that he is considered to be a high-profile militant or terrorist suspect, or that he is suspected of violent activities. When the complainant was allegedly detained by the police in 1992 and 1993, he was allegedly released upon payments of a bribe and without any charges having been laid. He was also able to have his passport renewed after leaving India. In addition, the complainant's assertions that, if returned to India, he could face fabricated charges under counter-terrorism legislation or the Indian Penal Code, are entirely speculative. There is no objective evidence that the author would face any specific punishment or detention in the State of Punjab, let alone anywhere else in India. The complainant's submissions and the evidence before the Committee refer only to a generalized and unspecified risk to the complainant on return to India. He has not provided any objective evidence or credible reason to the Committee that would demonstrate that relocation to another part of India other than the State of Punjab is not possible in his case. On the basis of the above information, the State party considers that the interim measures are not warranted in the present communication.

4.5 On 12 May 2016, the State party submits that the communication is inadmissible on two grounds. First, the complainant did not exhaust all available domestic remedies. He failed to seek leave from the Canadian Federal Court to apply for judicial review of three administrative decisions: (1) a decision that, in the period since the rejection of the complainant's application for refugee status, no new facts had come to light that might affect the pre-removal risk assessment; (2) a decision that there were no grounds to grant permanent residence in Canada based on humanitarian and compassionate factors; and (3) a decision that there was no new evidence of risk or evidence of new risk to justify deferring the author's removal to India. The State party maintains, contrary to the views expressed by the Committee in some of its cases, that judicial review does not include a review of the merits of the complainant's claim that he or she would be tortured if returned to the country of origin and that judicial review provides an effective remedy against removal.[12] The State party notes, inter alia, that the function of judicial review is to ensure the legality, the reasonableness and the fairness of the decision-making process and its outcomes. The

[8] See Canada, Immigration and Refugee Board of Canada, Research Directorate, "India: Treatment of members and supporters of the Shiromani Akali Dal (Amritsar/Mann) party, particularly those who speak publicly about the treatment of Sikhs by the Indian authorities or those who call for the creation of Khalistan (a separate homeland for Sikhs); whether members are monitored by the police for signs of links with terrorism (March 2009-April 2012)" (30 April 2012), part 2.1, available at: http://irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=453968. See also Canada, Immigration and Refugee Board of Canada, Research Directorate, Treatment of political activists and members of opposition parties in Punjab (2012–April 2015), part 3, which reports a source as indicating that members of non-mainstream political parties, such as radical Sikh groups, faced arrests, detention, and torture even at the time of writing, although the scale of such anti-human rights activities had declined.

[9] Ibid.

[10] See Canada, Immigration and Refugee Board of Canada, "Treatment of Sikhs in Punjab (2013-April 2015)", part 2.3.1, which reports a source as stating that Sikhs who advocated for and supported a separate Sikh state or Khalistan continued to face serious human rights violations; and "Treatment of political activists and members of opposition parties in Punjab (2012-April 2015)", part 3, which reports a source as indicating that activists who advocated for secession, independence or sovereignty from India faced the harshest treatment.

[11] See the United Kingdom, Border Agency, "Operational Guidance Note: India" (May 2013), para. 3.9.13.

[12] Reference is made to *Singh v. Canada* (CAT/C/46/D/319/2007), para. 8.8; and *W.G.D. v. Canada* (CAT/C/53/D/520/2021), para. 7.3.

grounds of review listed in section 18.1 (4) of the Canadian Federal Courts Act cover all the substantive ways in which a decision could potentially be reviewed in any context: whether the decision maker acted within its jurisdiction, complied with procedural fairness principles or made a factual or legal error. Thus, in order properly to carry out its responsibilities, the Canadian Federal Court would necessarily need to review an applicant's claim of being returned to face torture in his or her country of origin. If the Federal Court decides that there was an error of law or an unreasonable finding of fact in the decision under review, it has the authority to set the decision aside and send it back for redetermination by a different decision maker, in accordance with such directions as the Court considers to be appropriate. A judicial stay of removal pending the disposition of a Federal Court application may also be available. The complainant's assertions that judicial review is ineffective, expensive and unlikely to succeed are entirely unsubstantiated. Mere doubts about the effectiveness of a remedy do not absolve a complainant from seeking to exhaust that remedy and it is generally not within the scope of the Committee's competence to evaluate the prospects of success of a domestic remedy.[13] Finally, the author has not shown, or even alleged, that he lacked the financial means to pursue judicial review.

4.6 Second, the State party submits that the complainant's claim that his return to India would be a violation of article 3 of the Convention is manifestly unfounded. The complainant's allegations of risk have been thoroughly considered by multiple domestic decision makers. His application for refugee status was rejected on the basis that his allegations were not credible. The complainant has not provided sufficient evidence to substantiate that he has been subjected to torture in the past, and even if this had been demonstrated, it was not in the recent past, as the author left India in 1994. The complainant has not submitted sufficient evidence that would demonstrate that he is at personal risk of torture should he be returned to India. It is unlikely that any risk that might once have existed for him in his village in the State of Punjab would still exist should he return there. In addition, there is nothing in the communication to suggest that the central authorities in India would have an interest in the complainant such that he would not have an internal flight alternative.

4.7 The State party maintains that, should the Committee consider the complainant's communication to be admissible, its position would be that the communication is without merit. The complainant has not established that he faces a foreseeable, real and personal risk of being subjected to torture if returned to India.

Complainant's comments on the State party's observations

5.1 In his submission dated 8 August 2016, the complainant asks the Committee to consider his communication on its merits and insists that he has exhausted all available and effective domestic remedies. He states that, even if granted by the Canadian Federal Court, the judicial review of his application for permanent residence based on humanitarian and compassionate grounds would not have the effect of staying his removal. He agrees that he could have sought judicial review of other decisions with stay of removal but this process is very expensive, ineffective and is unlikely to bring effective relief to the complainant.

5.2 The complainant asserts that he has established a strong prima facie case and that the rejection of pertinent evidence for no reason by the State party amounts to a denial of justice. He insists that medical testimony, photographic evidence and affidavits provided in the submission are clear evidence that he and his family have been subjected to torture. The complainant alleges that Sikhs continue to be victims of State brutality and torture throughout India.

5.3 The complainant rejects a possibility of the internal flight alternative. He states that the Indian security agencies are looking for him and the police considers him to be a terrorist asset. He is a high-profile leader of the prominent Shiromani Akali Dal (Amritsar/Mann) party and is well-known throughout India. Anyone moving from one part

[13] Reference is made to *M.A. v. Canada*, (CAT/C/14/D/22/1995), paras. 3–4; *P.S. v. Canada* (CAT/C/23/D/86/1997), paras. 5.1–5.3 and 6.3; and *R.K. v. Canada* (CAT/C/19/D/42/1996), paras. 6.4 and 7.2.

of India to another must register with the local police: a procedure that the complainant, as a victim of torture at the hands of the police in the past and a person currently of interest to them, dare not complete.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged or is unlikely to bring effective relief.[14]

6.3 The Committee notes the State party's observation that the complainant did not file requests for judicial review of the decision concerning pre-removal risk assessment, of the decision concerning his application for permanent residence based on humanitarian and compassionate grounds and of the refusal to defer his deportation. The Committee reiterates its jurisprudence that the humanitarian and compassionate application is not an effective remedy for the purposes of admissibility pursuant to article 22 (5) (b) of the Convention given its discretionary and non-judicial nature and the fact that it does not stay the removal of a complainant.[15] Accordingly, the Committee does not consider it necessary for the complainant to exhaust the judicial review of the humanitarian and compassionate proceedings for the purpose of admissibility.

6.4 As for complainant's failure to apply for leave to seek a judicial review of the pre-removal risk assessment decision, the Committee notes the State party's argument that the pre-removal risk assessment decision may be judicially reviewed by the Canadian Federal Court with leave and a judicial stay of removal pending the final decision may also be available. From the information available to it on file, the Committee observes that, according to Section 18.1 (4) of the Federal Courts Act, a judicial review of a pre-removal risk assessment decision by the Federal Court is not limited to errors of law and mere procedural flaws and the Court may look at the substance of a case. The Committee also observes that the complainant has not put forward arguments substantiating his allegation that a judicial review of the pre-removal risk assessment decision is not an effective remedy. He merely argues that this procedure is very expensive and ineffective since the chances of success are low. In this regard, the Committee recalls that the mere doubt about the effectiveness of a remedy does not dispense a complainant from the obligation to exhaust it and that the Federal Court may, in appropriate cases, look at the substance of a case.[16] Accordingly, the Committee considers that, in the circumstances of the present case, the complainant has failed to exhaust all available domestic remedies since he did not file an application for judicial review of the pre-removal risk assessment decision before the Federal Court.

6.5 The Committee recalls that, for a claim to be admissible under article 22 (2) of the Convention and rule 113 (b) of its rules of procedure, it must rise to the basic level of substantiation required for purposes of admissibility.[17] The Committee notes the State party's argument that the communication is manifestly unfounded owing to a lack of

[14] See, inter alia, *E.Y. v. Canada* (CAT/C/43/D/307/2006/Rev.1), para. 9.2.

[15] See *J.M. v. Canada* (CAT/C/60/D/699/2015), para. 6.2; *A v. Canada* (CAT/C/57/D/583/2014), para. 6.2; *W.G.D v. Canada* (CAT/C/53/D/520/2012), para. 7.4; and *J.S. v. Canada* (CAT/C/62/D/695/2015) para. 7.3.

[16] See, for example, *Aung. v. Canada* (CAT/C/36/D/273/2005/Rev.1), para. 6.3; and *S.S. and P.S. v. Canada* (CAT/C/62/D/702/2015), para. 6.5.

[17] See, inter alia, *Z. v. Denmark* (CAT/C/55/D/555/2013), para. 6.3.

substantiation. In this regard, the Committee notes the complainant's claim that he was arrested and tortured for his political activities in 1992 and 1993. In this regard, the Committee notes that the complainant only obtained a medical certificate on 19 November 2015, when his deportation to India was imminent, one day in advance of filing his complaint with the Committee. In the Committee's view, the fact that the complainant has not requested the certificate at an earlier stage in order to present it to the domestic authorities in support of his claim for asylum significantly undermines the evidentiary value of the certificate. The Committee also observes that, although the complainant was arrested allegedly for his political activities, the police did not press charges or record his arrest, and released him in exchange for a bribe. The Committee further notes that there is nothing in the submission to suggest that the complainant has been politically active while residing abroad during this significant period. Therefore, the claim that the Indian police believe that he is assisting Sikh terrorists is not supported by any evidence. In this light, it is unclear why the complainant's father, who did not report experiencing any problems on account of his own political activity within the Shiromani Akali Dal (Amritsar Mann) party, would be arrested and tortured because of the return of the complainant, who was absent from India for 23 years and did not show evidence of any political activity. The Committee therefore observes that the complainant's claims, which rest solely on his own allegations relating to past events, are insufficient to establish a direct risk of torture if the complainant is returned to India. In this light, the Committee considers that the complainant has also failed to sufficiently substantiate, for the purpose of admissibility, his claim that he will be at a foreseeable, real and personal risk of torture.

6.6 The Committee therefore decides:

(a) That the communication is inadmissible under article 22 (2) and (5) (b) of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.